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GTP Network Sdn Bhd v Pemungut Duti Setem

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HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24NCvC-444–03 OF 2024
HAZIZAH KASSIM JC
24 DECEMBER 2024

C

Revenue Law — Stamp duty — Appeal — Appellant entered into asset purchase agreement — Collector of stamp duties treated agreement as novation agreement — Collector of stamp duties charged ad valorem stamp duty — Appellant appealed under s 39(1) of Stamp Act 1949 ('Act 378') — Whether asset purchase agreement should be chargeable with nominal stamp duty under item 4 of First Schedule to Act 378 — Whether asset purchase agreement should be exempted from stamp duty under exemption (a) under item 4 of First Schedule to Act 378 — Whether asset purchase agreement should be chargeable to ad valorem stamp duty under item 32(a) of First Schedule to Act 378 — Stamp Act 1949 ss 38A(5), 39(1), First Schedule item 4, item 4 exemption (a) & item 32(a)

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This was the appellant's appeal pursuant to s 39(1) of the Stamp Act 1949 ('Act 378') via originating summons before the court against the decision made by the collector of stamp duties ('the respondent') in *notis taksiran sekuriti (duti kekal selepas rayuan)* dated 13 February 2024 under s 38A(5) of Act 378. In the said decision, the respondent had affirmed notis taksiran sekuriti (duti ad valorem) dated 11 September 2023 which imposed a stamp duty in the sum of RM584,020 on the asset purchase agreement entered between the appellant and MEBA Holdings Sdn Bhd ('MEBA') in relation to the purchase of 16 telecommunication towers by the appellant from MEBA. In this regard, the respondent had treated the asset purchase agreement as novation agreement. The issue that arose was whether the asset purchase agreement should be: (a) chargeable with nominal stamp duty under item 4 of the First Schedule to Act 378; (b) exempted from stamp duty under exemption (a) under item 4 of the First Schedule to Act 378; or (c) chargeable to ad valorem stamp duty under item 32(a) of the First Schedule to Act 378.

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Held, allowing the originating summons with costs of RM6,000 subject to the allocator:

I

(1) The asset purchase agreement in the present appeal was merely an agreement to convey where the completion would take place in the future and did not amount to a conveyance. Therefore, the respondent could not impose stamp duty ad voleram on the said agreement. Based on the said agreement, it was clear that the instrument did not transfer the assets

in question; some other act was necessary for the property to pass to the purchaser. As the purchaser, the appellant could not use the tower until the license was obtained and further deliverables were executed by MEBA and the appellant. The court agreed with the appellant that the respondent had erroneously treated the said agreement as a novation agreement (see paras 45–46, 49 & 51–52).

(2) The appellant submitted that the respondent treated the asset purchase agreement as a novation agreement but did not file any affidavit in reply. In this regard, it was settled law that any assertion or allegation in an affidavit not contradicted by the counterparty would be deemed admitted by the counterparty (see paras 53–54).

[Bahasa Malaysia summary

Ini adalah rayuan perayu menurut s 39(1) Akta Setem 1949 ('Akta 378') melalui saman pemula di hadapan mahkamah terhadap keputusan yang dibuat oleh pemungut duti setem ('responden') dalam notis taksiran sekuriti (duti kekal selepas rayuan) bertarikh 13 Februari 2024 di bawah s 38A Akta 378. Dalam keputusan tersebut, responden telah mengesahkan notis taksiran sekuriti (duti ad valorem) bertarikh 11 September 2023 yang mengenakan duti setem berjumlah RM584,020 ke atas perjanjian pembelian aset yang dimeterai antara perayu dan MEBA Holdings Sdn Bhd ('MEBA') berhubung pembelian 16 menara telekomunikasi oleh perayu daripada MEBA. Dalam hal ini, responden telah menganggap perjanjian pembelian aset tersebut sebagai perjanjian novasi. Isu yang timbul ialah sama ada perjanjian pembelian aset tersebut sepatutnya: (a) dikenakan duti setem nominal di bawah butiran 4 Jadual Pertama Akta 378; (b) dikecualikan daripada duti setem di bawah pengecualian (a) di bawah butiran 4 Jadual Pertama Akta 378; atau (c) dikenakan duti setem ad valorem di bawah butiran 32(a) Jadual Pertama kepada Akta 378.

Diputuskan, membenarkan saman pemula dengan kos sebanyak RM6,000 tertakluk kepada alokatur:

(1) Perjanjian pembelian aset dalam rayuan semasa hanyalah perjanjian untuk memindah hak di mana penyiapan akan berlaku pada masa hadapan dan tidak sama dengan pemindahhakan. Oleh itu, responden tidak boleh mengenakan duti setem ad voleram ke atas perjanjian tersebut. Berdasarkan perjanjian tersebut, adalah jelas bahawa instrumen tersebut tidak memindahkan aset berkenaan; beberapa tindakan lain adalah perlu untuk harta tersebut diserahkan kepada pembeli. Sebagai pembeli, perayu tidak boleh menggunakan menara-menara tersebut sehingga lesen diperoleh dan penyerahan selanjutnya telah dilaksanakan oleh MEBA dan perayu. Mahkamah bersetuju dengan perayu bahawa responden telah tersilap menganggap perjanjian tersebut sebagai perjanjian novasi (lihat perenggan 45–46, 49 & 51–52).

(2) Perayu berhujah bahawa responden menganggap perjanjian pembelian aset tersebut sebagai perjanjian novasi tetapi tidak memfailkan apa-apa afidavit balasan. Dalam hal ini, undang-undang telah diselesaikan bahawa apa-apa penegasan atau dakwaan dalam afidavit yang tidak dicanggahi oleh pihak lawan akan dianggap diakui oleh pihak lawan tersebut (lihat perenggan 53–54).]

Cases referred to

BASF Services (M) Sdn Bhd v Pemungut Duti Setem [2010] 4 MLJ 596; [2010] 5 CLJ 109, FC (refd)

Commissioner of Stamps v Queensland Meat Export Company, Limited [1917] AC 624, PC (refd)

Lap Shun Textiles Industrial Co Ltd v Collector of Stamp Revenue [1976] 1 All ER 833, PC (refd)

Lim Teck Lee v Commissioner of Stamps [1956] 1 MLJ 135, CA (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)

Pemungut Duti Setem v Havi Logistics (M) Sdn Bhd [2024] 1 MLJ 177, CA (refd)

Pemungut Duti Setem v Lee Koy Eng (as administrator to the estate of Tan Kok Lee @ Tan Chin Chai, deceased) and another appeal [2022] 6 MLJ 45, FC (folld)

Stanway Limited v Collector of Stamp Duty, Ipoh [1932] MLJU 1; [1932] 1 LNS 177, SC (refd)

The Commissioners of Inland Revenue v G Angus & Co (1889) 23 QBD 579, CA (refd)

UN Finance Bhd v Director-General of Inland Revenue [1975] 2 MLJ 224, FC (refd)

Legislation referred to

Stamp Act 1949 ss 2, 20B, 21, 26, 39, 38A(1), (5), 39(1), First Schedule, items 4, 32(a), Fourth Schedule, Fifth Schedule, item 1

Anand Raj (with Foong Pui Chi and Jeevitha T Thurai Rathnam) (Shearn Delamore & Co) for the applicant.

Nur Aina Mohd Jaffar (with Intan Natasha Yusri) (Inland Revenue Board of Malaysia) for the respondent.

Hazizah Kassim JC:

INTRODUCTION

[1] The appellant GTP Network Sdn Bhd filed an appeal under s 39(1) of the Stamp Act 1949 through originating summons before this court against the decision made by the respondent in *notis taksiran sekuriti (duti kekal selepas rayuan)* dated 13 February 2024 under s 38A(5) of the Stamp Act. The respondent affirmed *notis taksiran sekuriti* (duty ad valorem) dated

11 September 2023, which they issued.

MATERIAL FACTS

[2] The dispute between the appellant and the respondent appears in the following circumstances as in the case stated.

[3] On 1 August 2023, the appellant entered an asset purchase agreement in MEBA Holdings Sdn Bhd ('MEBA'). The appellant acquires, among others, 16 telecommunication towers ('the assets') from MEBA for RM15m.

[4] The words 'towers' in the said agreement have been interpreted as — 'sixteen telecommunications towers owned by the vendor as set out in Schedule 1 together with all assets, equipment and fixtures associated with and/or are required for the proper functioning and operations of the said telecommunications towers including but not limited to power supply modules, cabins, full tank, security fencing, generator sets, cabling and dark fibre, all of which are strictly chattels, moveable assets and equipment (and all of which are transferred via delivery by hand), constructed, operated and leased to customers;'.

[5] As of 1 August 2023, legal ownership of the assets has not been transferred to the appellant.

[6] On 30 August 2023, the appellant, through its solicitors Messrs Zul Rafique & Partners, submitted the application for stamp duty for the assets purchase agreement under s 26 of the Stamp Act online to STAMPS's portal.

[7] The respondent, via telephone conversation on 5 September 2023, informed Messrs Zul Rafique & Partners that the information in the adjudication was wrong and that the appellant should state that the application is for a novation agreement.

[8] In addition, the respondent, through the STAMPS portal, also informed the appellant that the assessment is to be made under s 21 of the Stamps Act, and the stamp duty is subject to item 32(a) of the First Schedule of the Stamp Act. The respondent does not categorise the assets as inventory.

[9] Based on the information, Messrs Zul Rafique & Partners resubmitted the adjudication application on behalf of the appellant to facilitate the adjudication.

[10] On 11 September 2023, the respondent issued a notis taksiran sekuriti

(duti ad valorem) and imposed a stamp duty of RM584,020 on the assets purchase agreement.

[11] After that, Messrs Zul Rafique & Partners submitted a notice of objection under s 38A(1) of the Stamp Act via the STAMPS portal based on the reasons, among others:

(a) the assets purchase agreement is for purchasing telecommunication towers and basic telecommunication infrastructures, which are chattel. The agreement should come under item 4, First Schedule of the Stamp Act, and the nominal stamp duty to be imposed is RM10;

(b) in the case of *BASF Services (M) Sdn Bhd v Pemungut Duti Setem* [2010] 4 MLJ 596; [2010] 5 CLJ 109, the Federal Court held that the transfer of a chattel by way of physical delivery, unless disallowed by some law, is itself not chargeable to any duty; and

(c) MEBA only sold certain assets to the appellant, not the whole business.

RESPONDENT'S SUBMISSION

[12] The primary submission by the respondent is stamp duty is imposed on instruments and not the transaction in which the respondent refers to cl 2.2(a) of the asset purchase agreement dated 1 August 2023, which states:

> 2.2 Notwithstanding the Unconditional Date or Completion Date has not been achieved, the Parties hereby agree and acknowledge that:
>
> (a) the economic rights and benefits to the Sale Assets shall be vested and accorded to the Purchaser and accrued from the date of this Agreement;

[13] The respondent is relying on the case of *Lim Teck Lee v Commissioner of Stamps* [1956] 1 MLJ 135, which held that:

> The fundamental principle is this. The Stamp Act taxes instruments, not transactions. If there are two ways of carrying out a transaction and the parties are content with the simpler, they are entitled to carry it out in that way.

[14] The respondent averred that for an instrument to be chargeable to stamp duty, it must be shown clearly and unambiguously that the instrument falls within the provisions of the Act. The respondent relied on the case of *Lap Shun Textiles Industrial Co Ltd v Collector of Stamp Revenue* [1976] 1 All ER 833, which held that:

> The stamp duty legislation generally proceeds by way of stamping documents according to their nature and effect and not by references to parties' intentions, and any departure from this principle would require clear indication.

[15] The respondent also refers to ss 20B and 23 of the Stamp Act, which provides as follows:

> s 20B of the Stamp Act
>
> *20B Vesting or transfer of an undivided interest in property*
>
> (1) Every conveyance either on sale or by way of gift or settlement which operates to vest or transfer an undivided interest in real property, shall contain an affidavit of the transferee certifying that the transaction effected by the instrument does not form part of a larger transaction or series of transactions completed or to be completed Stamp 39 within a period of twelve months after the date of the first of the instruments employed to complete the conveyance of the property.
>
> (2) Where the transaction effected by the instrument forms part of a larger transaction or series of transactions, ad valorem duty upon that instrument and upon any other instrument following shall be calculated on the aggregate of the consideration or market values of the separate parts or parcels being conveyed, whichever is the higher, at the rates specified under item 32(a) of the First Schedule.
>
> s 23 of the Stamp Act
>
> *23 What is to be deemed a conveyance, not being a sale or mortgage*
>
> Every instrument and every decree or order of any court, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, shall be charged as a conveyance or transfer of property.

[16] The respondent further averred that using the word 'vested' in cl 2.2 (a) of the asset purchase agreement, the instrument has to be treated as a document of conveyance and falls under item 32(a) of the First Schedule of the Stamp Act. Clause 2.2 (a) is a deeming clause that the rights and benefits of the assets have been on the appellant.

[17] The respondent refers to the definition of conveyance on sale in s 2 of the Stamp Act to support the respondent's argument that the asset purchase agreement between the appellant and MEBA is a conveyance on sale and should be charged with ad valorem duty. The respondent relied on the Court of Appeal case of *Pemungut Duti Setem v Havi Logistics (M) Sdn Bhd* [2024] 1 MLJ 177, which held that:

> the definition makes it clear that an instrument by which property or interest would be regarded as a conveyance on sale. This definition of conveyance of sale is pari materia with s 54 of the Stamp Act 1891 of England & Wales upon which our Act is based. Hence cased decided under the English provision will be highly persuasive.

[18] In addition, the respondent submitted that to come within the definition of conveyance of sale, the conveyance must be of 'property' and/or interest in the property, and there was a sale of the property together with all title and rights attached thereto as in the appellant's case.

[19] Thus, the respondent treated the asset purchase agreement as an instrument of conveyance and became dutiable to ad valorem duty under item 32(a) of the First Schedule of the Stamp Act.

ISSUES TO BE DETERMINED

[20] The question to be determined by this court is whether the asset purchase agreement dated 1 August 2023 between the appellant and MEBA should be:

(a) chargeable with nominal stamp duty under item 4 of the First Schedule to the Stamp Act 1949;

(b) exempted from stamp duty under exemption (a) under item 4 of the First Schedule to the Stamp Act 1949; or

(c) chargeable to ad valorem stamp duty under item 32(a) of the First Schedule to the Stamp Act 1949.

LEGAL PRINCIPLE

[21] The relevant provisions under the First Schedule of the Stamp Act 1949 are as follows:

(a) chargeable with nominal stamp duty under item 4 of the First Schedule to the Stamp Act 1949:

> 4 AGREEMENT OR MEMORANDUM OF AGREEMENT made underhand only, and not otherwise specially charged with any duty, whether the same is only evidence of a contract or obligatory on the parties from its being a written instrument.

(b) exempted from stamp duty under exemption (a) under item 4 of the First Schedule to the Stamp Act 1949:

> Exemptions
>
> Agreement or Memorandum:
>
> (a) for or relating to the sale of any goods, wares or merchandise other than a hire-purchase agreement;
>
> (b) for service or personal employment where the wages do not exceed RM300 per month, and any agreement between the master and mariners of any vessel or boat for wages;
>
> (c) the matter whereof is of a value of less than RM300;
>
> (d) for the reference of any matter to arbitration;
>
> (e) for the payment of interest on money deposited in any bank or with any banker;

(f) for the repurchase of negotiable certificate of deposit whose issue has been authorised by Bank Negara Malaysia.

Note — An agreement for or relating to the supply of goods on hire, whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied, shall be charged with stamp duty as an agreement, or, if under seal, as a deed.

(c) chargeable to ad valorem stamp duty under item 32(a) of the First Schedule to the Stamp Act 1949:

32 CONVEYANCE, ASSIGNMENT, TRANSFER OR ABSOLUTE BILL OF SALE: (a) On sale of any property (except stock, shares, marketable securities and accounts receivables or book debts of the kind mentioned in paragraph (c))

For every RM100 or fractional part of RM100 of the amount of the money value of the consideration or the market value of the property, whichever is the greater —

(i) RM1.00 on the first RM100,000;

(ii) RM2.00 on any amount in excess of RM100,000 but not exceeding RM500,000;

(iii) RM3.00 on any amount in excess of RM500,000 but not exceeding RM1,000,000; and

(iv) RM4.00 on any amount in excess of RM1,000,000.

[22] Under s 39 of the Stamp Act, the appealing party has the right to require the Collector to state and sign a case, setting the question and his decision. Section 39 of the Stamp Act provides for an appealability of an appeal by way of case stated:

39 *Appeal to High Court*

(1) Any person who is dissatisfied with the decision of the Collector under subsection 38A(5) may, within twenty-one days after the person is notified in writing of that decision and upon payment of duty in conformity therewith, appeal against the decision to the High Court by filing a notice of appeal with the High Court and may for that purpose require the Collector to state and sign a case, setting forth the question upon which is opinion was required, and the decision made by him.

(1A) Where a notice of appeal has been filed under subsection (1), the notice shall be served on the Collector within the time stipulated for the filing of the notice of appeal.

(2) The Collector shall thereupon state and sign a case and deliver the same to the person by whom it is required, and the case may, within seven days thereafter or within such further time as the Court may allow, be set down by him for hearing.

(3) Upon the hearing of the case the Court shall determine the question submitted, and, if the instrument in question is in the opinion of the Court chargeable with any duty, shall assess the duty with which it is chargeable.

(4) Subject to subsection (4A), if it is decided by the Court that the assessment or additional assessment of the Collector is erroneous, any excess of duty which may have been paid in conformity with the erroneous assessment, together with any fine or penalty which may have been paid in consequence thereof, shall be ordered by the Court to be repaid to the appellant, with or without costs as the Court may determine.

(4A) Nothing in this section shall operate to compel the Collector to refund the excess amount of duty which may have been paid in conformity with the erroneous assessment, together with any fine or penalty which may have been paid unless the assessment has become final and conclusive in accordance with section 36D.

(5) If the assessment or additional assessment of the Collector is confirmed the Court may make an order for payment to the Collector of the costs incurred by him in relation to the appeal.

[23] In the Federal Court case of *Pemungut Duti Setem v Lee Koy Eng (as administrator to the estate of Tan Kok Lee @ Tan Chin Chai, deceased) and another appeal* [2022] 6 MLJ 45, Mary Lim FCJ held that:

[12] As a case stated, the High Court is not required to hear evidence and make findings on factual evidence heard. The nature of of a case stated is well-explained in the following cases and we feel it timely to remind our selves what exactly a case stated entails despite its ancient roots. The proper appreciation of what a case stated is necessary as it then attends to the myriad of related issues as to conduct of the case stated at the High Court and more significantly, the jurisdiction of the High Cout that is invoked.

[24] Furthermore, in the case of *UN Finance Bhd v Director-General of Inland Revenue* [1975] 2 MLJ 224, the Federal Court held that:

It may be trite to say but it will be of use to remind ourselves that an appellate court in income tax cases has only limited function to perform. It is bound by the findings of facts by the Special Commissioners and set out in the statement of the case ...

The burden of proof in stamp duty cases

[25] In *Pemungut Duti Setem v Lee Koy Eng (as administrator to the estate of Tan Kok Lee @ Tan Chin Chai, deceased) and another appeal* [2022] 6 MLJ 45, the Federal Court held as follows:

[21] Lastly, on this point of what and how a case stated is to be handled, Chan Sek Keong CJ in *Cheok Doris v Commissioner of Stamp Duties* [2010] 4 SLR 397; [2010] SGCA 28 said:

... the only purpose of the case stated was to facilitate the court to answer the

stated questions on the basis of facts as stated. There is no burden of proof on any party as the issues to be decided are issues of law.

[26] The above principle guides this court that the appellant has no burden of proof in this case.

ANALYSIS AND DECISION

[27] This case arises from the appellant purchasing approximately 16 telecommunication towers from MEBA.

[28] The question to be determined is whether the asset purchase agreement entered between the respondent and MEBA should be chargeable with nominal stamp duty under item 4 of the First Schedule or would be exempted from stamp duty according to exemption (a) under item 4.

[29] The respondent contended that the asset purchase agreement should be charged with ad valorem stamp duty under item 32(a) of the First Schedule to the Stamp Act as the conveyance.

[30] On the other hand, the appellant averred that the documents are merely an agreement to convey. The asset purchase agreement, like the SPA, is an agreement to convey, not the conveyance.

[31] Based on the decision made by the Federal Court in *Pemungut Duti Setem v Lee Koy Eng (as administrator to the estate of Tan Kok Lee @ Tan Chin Chai, deceased) and another appeal* [2022] 6 MLJ 45, there is no burden of proof in the appeal of the stamp duty under the Stamp Act compared to the Income Tax Act. Therefore, the only purpose of the case stated in the stamp duty matter is to facilitate the court's determination of this appeal.

[32] By issuing *notis taksiran* for the stamp duty, the respondent had treated the asset purchase agreement as a novation agreement. Subsequently, in issuing the notis taksiran sekuriti to confirm the decision after the appeal dated 13 February 2024, the respondent continued to treat the agreement as a novation agreement. Hence, the respondent concluded the asset purchase agreement was subject to ad valorem duty.

[33] The respondent has admitted that it was the respondent who had contacted the appellant's transactional solicitors, Zul Rafique & Partners and informed Messrs Zul Rafique & Partners that the agreement in question needs to be resubmitted or refiled under the category of novation agreement for

stamp duty adjudication purposes. Failing which, the respondent will not stamp it. A

[34] Given the above, the appellant contends that when the document is submitted for adjudication, it is up to the respondent to stamp it for RM10 or at a higher value and take a position. Furthermore, according to the appellant, there is no reason why the respondent should tell the solicitors to resubmit. B

[35] This court believes that if the respondent considered the substance of the document, it would be clear that nothing in need of substance constitutes a novation. Besides that, in treating the asset purchase agreement as the novation agreement, no reason was given by the respondent. C

[36] This court will determine whether the asset purchase agreement should be chargeable with nominal stamp duty under item 4 of the First Schedule to the Stamp Act or chargeable with ad volarem stamp duty under item 32(a) of the First Schedule to the Stamp Act. D

[37] In *Stanway Limited v Collector of Stamp Duty, Ipoh* [1932] MLJU 1; [1932] 1 LNS 177, the then Supreme Court held: E

> Now, it is an elementary rule of construction that the construction of a document must be made upon the entire document, so that one part may help to expound another, and that every part may take effect, and none be rejected ...
>
> Again, another principle which is always accepted is that the best way to gather the intention of the parties to a transaction is to construe the instruments wherein they themselves have expressed the bargain between them ... F

[38] In answering the question, this court must examine the substance of the asset purchase agreement dated 1 August 2023. G

[39] In the asset purchase agreement, sale assets are defined in cl 1 as follows:

> means all the Towers together with all Licence Agreements, Permits, Site Agreements, Right of Way Agreements and all improvements (including civil works, base for the Towers and fencings) made by the Vendor to the Sites. H

[40] Under cl 2, the agreement to sell assets is conditional and subject to the terms and conditions of this agreement. Clause 2 of the asset purchase agreement provides as follows: I

> 2.1 Subject to the terms and conditions contained in this Agreement, the Vendor agrees to sell, transfer, deliver, pass and assign to the Purchaser and the Purchaser agrees to purchase, acquire and accept from the Vendor:

(a) as at the date of this Agreement, all beneficial ownership and to the extent possible, the legal ownership of the Sale Assets together with all title, rights and interest attached thereto; and

(b) as at the Completion Date, all legal ownership, title, right, risk and interest to each and every Sale Assets, including all legal rights, benefits and obligations to all Material Contracts (save where already transferred, delivered, passed and assigned to the Purchaser at the date of the Agreement in accordance with clause 2.1(a) and the Sale Assets shall be from all Encumbrances)

At the Purchase Consideration or as adjusted in accordance with Clause 6.2, Clause 6.3(b) and Clause 11.

[41] Meanwhile, cl 6.2 of the asset purchase agreement provides that on the agreed completion date, the appellant as the purchaser, shall pay MEBA, among other things, the balance of purchase consideration plus apportioned outgoings plus site deposits and minus licence deposits, income monies and adjustment for lack of permit. Concurrently, the vendor shall procure the doing of all those things set out in Schedule 5 concerning the sale assets.

[42] Schedule 5 of the asset purchase agreement provides for completion of deliverables. Other relevant conditions are as follows:

The Vendor shall, on Completion Date, deliver the following:

1. All originals of all Licence Agreements including any amendments thereto together with the duly executed novation agreements (to extent not already provided at the Unconditional Date);

2. All originals of all the Site Agreements including any amendments thereto with the duly executed novation agreement (to the extent not already provided at the Unconditional Date).

[43] Clause 5 of the agreement provides for the vendor's obligations pending completion, listed in Schedule 4, among others are as follows:

The Vendor covenants with the Purchaser that from the date of this Agreement up to and including the Completion Date that:

2. In respect of all Sale Assets, save where with prior written consent of the Purchase, it agrees that no changes, maintenance, repairs, replacement and any other works shall be implemented or carried on the material structures, equipment, and other tangible personal property (whether owned or leased by the vendor) and shall ensure that none of its service providers gain access to the Sites:

5. It shall ensure at its own cost that all Permits expiring on or before Completion Date shall be renewed promptly;

[44] It is also pertinent to look into cl 4.1 of the asset purchase agreement, which states as follows:

> The parties hereby agree that the Completion of the sale and purchase of the Sale Assets shall be conditional upon and subject to the Conditions Subsequent set out in Schedule 3.
>
> First of all the agreement between the companies here contemplates further assurance and things being done in order to vest in the purchasers the assets sold. It is a matter of common knowledge everywhere that the purchaser cannot become the real owner, for practical purposes of assets of the character of these, without something further being done.

[45] To my mind, it is clear that the asset purchase agreement in this appeal is merely an agreement to convey where the completion will take place in the future and does not amount to a conveyance.

[46] Therefore, based on the above analysis, the respondent cannot impose stamp duty ad voleram on the said agreement.

[47] The difference between a *conveyance* and an *agreement to convey* was considered in the case of *The Commissioners of Inland Revenue v G Angus & Co* (1889) 23 QBD 579, where the English Divisional Court held:

> ... ad valorem duty can only be made chargeable where everything is completed at the time when the instrument is executed, and where no future day, as here, is appointed for the completion of it.

[48] This court cannot agree to the respondent's submission at para 29 which says — 'respondent menyatakan perjanjian tersebut merupakan instrumen meletak hak atau memindah milik harta yang dijual kepada perayu tanpa memerlukan instrumen lain yang perlu diambil oleh MEBA kepada perayu'.

[49] Based on the said agreement, it is clear that the instrument does not transfer the assets in question; some other act is necessary for the property to pass to the purchaser. This item 1 in Schedule 5 is significant in supporting the appellant's contention that legal ownership had not been transferred to the appellant as the purchaser.

[50] In *Commissioner of Stamps v Queensland Meat Export Company, Limited* [1917] AC 624, the Privy Council held that an agreement that did not effect an immediate transfer of the assets was not chargeable with ad valorem duty.

[51] As the purchaser, the appellant cannot use the tower until the license is

obtained and further deliverables, such as the licence agreement, novation agreement, and right of way agreement, are executed by MEBA Holdings Sdn Bhd and the appellant.

[52] This court is with the appellant and that the respondent erroneously treated the agreement as a novation agreement.

[53] Besides that, the appellant also submitted that the respondent treats the asset purchase agreement as a novation agreement but did not file any affidavit in reply.

[54] It is settled law that any assertion or allegation in an affidavit not contradicted by the counterparty will be deemed admitted by the counterparty. The principle guides this court in the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, which stated that:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party make a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

CONCLUSION

[55] Based on the reasons above, the court allowed the originating summon with costs of RM6,000, subject to the allocator. The orders of this court are as follows:

(a) rayuan oleh perayu dibenarkan dan keputusan PDS diketepikan;

(b) deklarasi bahawa perjanjian bertarikh 1 Ogos 2023 hendaklah dikenakan duti setem pada kadar nominal RM10 sahaja;

(c) responden diperintahkan melepaskan hak menyemak, membatalkan atau meminda, mengikut mana yang berkaitan notis taksiran sekuriti (duti kekal selepas rayuan) bertarikh 13 Februari 2024 (No Adjudikasi T01DB0A567XB016) untuk menguatkuasakan perintah mahkamah ini;

(d) responden diperintahkan membayar balik kepada perayu duti setem berjumlah RM584,020 ke atas perjanjian tersebut yang telah dibayar oleh perayu kepada responden berikutan;

(e) keputusan PDS sebagaimana yang diarahkan oleh mahkamah ini; dan

(f) faedah pada kadar 5% setahun dibayar oleh responden kepada perayu dikira mulai dari tarikh pemfailan rayuan sehingga tarikh perintah ini dan kos dibenarkan.

Originating summons allowed with costs of RM6,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar